UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PAUL KACOCHA, on behalf of himself and all others similarly situated, Plaintiff, -against- NESTLÉ PURINA PETCARE COMPANY, Defendant.	:	Case No. 7:15-cv-05489 (KMK)

PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT'S MOTION TO DISMISS COMPLAINT

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Plaintiff, Paul Kacocha, hereby submits his Memorandum of Law in Opposition to Defendant's Motion to Dismiss Complaint.

NATURE OF ACTION AND INTRODUCTION

This is a putative class action brought on behalf of New York State consumers who purchased Nestlé Purina Petcare Company's ("Purina's") Beggin' Strips dog treat products. In a nutshell, Purina deceptively markets its popular Beggin' dog treat products as containing a substantial amount of real bacon, when in reality, bacon (and bacon fat) only comprise very minor ingredients of the product. By contrast, the main ingredients are non-meat fillers – ground wheat, corn gluten meal, wheat flour, water, ground yellow corn, sugar, glycerin, soybean meal, and hydrogenated corn syrup, plus at least five artificial preservatives.

The Beggin' dog treat products are cut, shaped, colored, and striated to look like real bacon, and they are flavored to smell like real bacon. The product name, "Beggin,'" is designed to, and does, sound virtually the same as "bacon" when spoken. Purina's misleading representations and omissions are conveyed to the consuming public uniformly and through a variety of media, including its omnipresent television advertisements, its websites and online promotional materials, and most importantly, at the point of purchase, where Purina ensures that the false claims are prominently made on the products' packaging and labeling, and pictures of giant bacon strips besot the packaging.

Purina deceives consumers into purchasing the Beggin' dog treat products in order to obtain the advertised ingredients -- most notably, real bacon -- that Purina knows the products contain only in miniscule amounts. And once they open the Beggin' packages, the product actually looks and smells like real bacon. As a result of Defendant's deceptive and unfair representations and material omissions, consumers -- including Plaintiff and members of the proposed class -- have purchased the Beggin' dog treat products, which they otherwise would not have purchased, and in any event, are more expensive than equivalent products. The Class Action Complaint (hereafter, the "Complaint") asserts a claim for violation of Section 349 of the General Business Law, and Plaintiff seeks monetary damages, including statutory damages, and injunctive relief.

Plaintiff's allegations readily plead a viable Section 349 claim. Indeed, Purina has already *lost* a very similar motion to dismiss a federal Lanham Act lawsuit for false advertising brought by a competitor involving the identical Beggin' dog treat products and the identical misrepresentations. *See Blue Buffalo Co., Ltd. v. Nestlé Purina PetCare Company*, Case No. 4:15-cv-00384-RWS, 2015 U.S. Dist. LEXIS 74905 (E.D. Mo. June 10, 2015). The *Blue Buffalo* court's well-reasoned decision sustaining the complaint in that action is equally convincing here, and Purina's motion to dismiss should be denied.

FACTS

Defendant Nestlé Purina Petcare Company manufactures, markets, and sells pet foods, pet treats, and related products in the State of New York, nationwide, and worldwide. Complaint, ¶10. Among its many pet products, Defendant manufactures and sells its Beggin' dog treat product line. *See* www.purina.com/products/Beggin. Defendant, on its Purina products webpage for the Beggin' product line, lists, under the heading "Ingredients & Nutrients," "Made with real bacon." No other ingredients or nutrients are specified. *See id.* The Beggin' Strips products are cut, shaped, and colored to replicate real bacon strips, and the strips are flavored to smell like real bacon too. *Id.*, ¶11.

Defendant aggressively markets its Beggin' dog treat product line, and engages in a long-running, popular, national television commercial campaign featuring comical videos of dogs enthusiastically musing about their strong desire for bacon and Defendant's Beggin' dog treat products. For example, Defendant's television commercials for its Beggin' Strips dog treat product plainly, but falsely, suggest that the product is made of bacon in such amounts as to be meaningful, and not merely incidental. Actually, however, the real main ingredients are non-meat fillers – ground wheat, corn gluten meal, wheat flour, water, ground yellow corn, sugar, glycerin, soybean meal, and hydrogenated corn syrup, plus at least five artificial preservatives. Bacon and bacon fat are present in miniscule quantities – i.e., in the Beggin' Strips Original Bacon Flavor product, they are the tenth and twelfth ingredients (by weight) of this highly-processed dog food. *Id.*, ¶13.

Yet the television commercials for Beggin' Strips falsely portray the product as containing bacon in sufficient quantities as to constitute a bacon treat. For instance, one famous television ad, *which Plaintiff has viewed*, bears the tagline "There's No Time Like Beggin' Time." The commercial has aired over 6,700 times on national and spot television, and is currently being aired. *See* www.ispot.tv/ad7IFX/purina-beggin-strips-beggin-time. The commercial begins with an adult female opening a bag of Beggin' Strips. A visualization of fumes emanates from the bag which waft to the family dog resting on the floor, head down. As soon as the fumes reach the dog, he jumps to attention, with a thought bubble emanating from his right ear. The thought bubble contains a picture of four strips of crispy bacon on a plate. The dog starts shouting (by a voiceover): "Bacon, gotta get that bacon!" before barking and running downstairs, seeking out the source of the fumes. The voiceover frenetically continues: "Smoky bacon! Crispy bacon! Tasty bacon!" as the dog races through the house, careening into a pile of alphabet blocks a small girl is playing with in the family room. The dog causes the tower of blocks to spin around until it stops and spells out "BACON" to the delight of the clapping child.

The dog runs into the living room, where the man of the house is napping in a recliner. Screaming "Where is it? Where's the bacon,?" (an ironic, though unintended metaphor for this entire case), the dog jumps on the napping man, waking him up all flustered. Another male voiceover, emanating from the television in the living room as a news broadcaster, states: "Bacon popular. Story at 11." The dog bursts into the kitchen, shouting "Yummy, crunchy, BACON! BACON! BACON!" After looking at an empty frying pan on the stovetop, the dog cries: "There, in that bag" as he sees the woman of the household holding the bag of Beggin' Strips. She wooingly entreats: "Who wants a Beggin' Strip?" The dog screams: "Me! I'd get it myself but I don't have thumbs. Yum! Yum! Yum! IT'S BEGGIN'! Mmm, I love you!" The woman hands the dog a strip that looks just like a bacon strip. The thankful dog jumps on her as she kneels, and he kisses her face. *Another male voiceover states: "Beggin' Strips, Made with real bacon.* There's no time like Beggin' time!," as a frying pan of oil sizzles in the background. Throughout the commercial, when the word "Beggin'" is used, it sounds just like "bacon." *Id.*, ¶14.

This well-known television commercial, and others used by Defendant to market its Beggin' dog treat products, falsely portray the treats as being made *largely* of real bacon, and thus constituting a bacon-based treat for dogs. Yet, "real bacon" is only a very minor ingredient in the product, which is predominantly made out of processed wheat, corn, sugar, glycerin, water, and soy. "Bacon" and "Bacon Fat" are the tenth and twelfth ingredients in the product, by weight. Moreover, to the extent that "bacon" is used, even in the minute quantities listed, it is unclear what meat product or other ingredients comprise the "bacon" and by what process this ingredient is deemed to be "bacon." *Id.*, ¶15.

Significantly, the product packaging for Beggin' Strips contains and reinforces the same false and misleading claim that the product consists largely of real bacon. *Id.*, ¶16. The Beggin' Strips packaging contains a "Principal Display Panel" ("PDP"). A Principal Display Panel is "the part of a label that is most likely to be displayed, presented, shown, or examined under customary conditions of display for retail sale." 21 C.F.R. §101.1. Defendant's false and misleading message is presented on these PDPs, which all consumers see when they pick up the Beggin' Strips package to buy or use. For example, the 25 ounce bag of Beggin' Strips Original Bacon Flavor shows on the PDP a salivating dog, licking his chops in the lower left. The upper half of the package states "Purina" in moderate size type on the upper left, with "Beggin' Strips" proclaimed in large, bold type at the center, with the words "Brand Dog Snack" in very small type below. Immediately below that, the weight of the package is set forth in large bold type – in this example, "25 oz." Below the 25 oz., the phrase "made with real bacon!" is prominently set forth. Below that is a large image of a crispy piece of bacon splayed across nearly one-half the package. Nestled just below to the bottom right of the crispy piece of bacon is an icon of a small black frying pan containing two sizzling pieces of bacon. In a purple ball atop which the bacon-filled frying pan rests, "bacon flavor" is boldly displayed. Just below the bottom circumference of the ball is the text "AHH, LOVE AT FIRST SNIFF!" Finally, in the bottom right corner of the packaging, the net weight of the product is set forth. *Id.*, ¶17.

The back packaging of the Beggin' Strips is equally misleading. The top half features the image of a crazed, outstretched, salivating dog chasing what looks like a giant crispy strip of bacon. Immediately below that image, in huge bold type, is the caption "BacoNology 101." Below "BacoNology 101" on the left of the packaging is a box containing the following text: "There's No Time Like Beggin' Time. Beggin.com." To the right of the box is the explanation of the meaning of the banner "BacoNology 101." Bullet point 1 is "EXCITEMENT = BEGGIN' X SPEED OF SMELL²." Bullet point 2 is "WHAT HAPPENS WHEN AN IRRESISTIBLE AROMA MEETS AN IMMOVABLE APPETITE? **BEGGIN' TIME!**" Bullet point 3 states: "AN OBJECT IN MOTION STAYS IN MOTION. CHECK OUT MY TAIL!" To the right of the bullet points is the icon of the black frying pan containing two crispy strips of bacon. At the very right corner of the back packaging, below a set of instructions to consumers to "Feed as a treat to your adult dog," is an oval containing text stating: "Baconologists standing by," followed by the Purina logo and the purina.com website address, the Purina call center phone number, and its hours of operation. The bottom left corner of the back packaging contains a "Guaranteed Analysis" of the protein, fat, and fiber content of the product, plus a list of ingredients, with the ingredients listed in decreasing order of predominance by weight. United States Food and Drug Administration ("FDA") regulations require food product ingredients to be listed in descending order of predominance, by weight, in nutrition labeling, 21 C.F.R. §101.4(a). *Id.*, ¶18.

The ingredients are listed as follows: (1) ground wheat; (2) corn gluten meal; (3) wheat flour; (4) water; (5) ground yellow corn; (6) sugar; (7) glycerin; (8) soybean meal; (9) hydrogenated corn syrup; (10) bacon (preserved with sodium nitrite): (11) salt; (12) bacon fat (preserved with BHA and citric acid); (13) meat; (14) phosphoric acid; (15) sorbic acid (a preservative); (16) calcium propionate (a preservative); natural and artificial smoke flavors; (17) Red 40; (18) Yellow 5; (19) Blue 1; (20) Yellow 6; and (21) added color.

Thus, the all-important front PDP for the Beggin' Strips Original Bacon Flavor, as well as the back packaging, plainly convey the false and misleading impression that Beggin' Strips are predominantly made out of real pork bacon. Consumers who are looking to purchase a real bacon treat for their dogs are deceived by Defendant's misleading labeling into buying Beggin'

Strips dog treat products that consist largely of processed wheat, corn, and soy, as well as water ("moisture" constitutes fully 26 percent of the product, according to the "Guaranteed Analysis" on the back of the packaging) – hardly the premium real pork bacon ingredients that are touted on the PDP and rear packaging and for which the consumers purchase the products, and in any event, for which consumers pay a price premium. *Id.*, ¶¶19-20.

The same type of false and misleading PDPs and back panel packaging are found on *all* the Beggin' dog treat products, specifically including, but not limited to, the Bacon flavor and Bacon & Cheese flavor Beggin' Strips that Plaintiff purchased for his dogs' consumption. Moreover, once a consumer opens the Beggin' package, she is presented with a product that is cut, shaped, colored, and textured to look like it is real bacon, and the product is flavored to smell just like real bacon. *Id.*, ¶21.

Plaintiff purchased the products for his own personal use – i.e., consumption by his dogs as a real bacon treat. Plaintiff purchased the products because he believed, based upon the claims made on the products' packaging and PDPs and television commercials, that they were comprised mainly of real bacon, as highlighted on the packaging and commercials, and he paid a premium price for those products. Plaintiff and the class members have been and will continue to be deceived or misled by Defendant's deceptive representations. Plaintiff purchased the dog treat products during the class period and in doing so, read and considered the products' PDPs and other packaging and based his decision to purchase the products on the representations made on the products' packaging, which is entirely consistent with Defendant's nationally-run television ads for the products which Plaintiff also has viewed. Defendant's representations and omissions were a material factor in influencing Plaintiff's decisions to purchase and have his dogs consume the Beggin' dog treat products. Plaintiff and the class would not have purchased the Beggin' dog treat products, or paid the premium price they paid, had they known Defendant's representations on the product packaging and in its advertising are false and misleading. As a result, Plaintiff and the class members have been injured in fact by their purchase of the products they were deceived into purchasing and for which they paid a premium price. Defendant, by contrast, has reaped enormous profits from its false marketing and sale of the products. *Id.*, ¶¶22-26.

ARGUMENT

I.

Plaintiff's General Business Law § 349 Claims Should Be Sustained

A. The Relevant Legal Standards

"To survive a motion to dismiss, a complaint must contain factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Deciding whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. *See Waldman v. New Chapter, Inc.*, 714 F.Supp. 2d 398, 401 (E.D.N.Y. 2010).

The instant complaint alleges that Defendant's packaging and marketing of its Beggin' Strips products misleads consumers into believing that they are purchasing a dog treat comprised largely of "real bacon," when bacon and bacon fat are actually very minor ingredients. In other words, Defendant creates the false impression that its dog treats contain a sufficient amount of bacon to make the product a bacon-based treat when, in fact, bacon is only found in trace amounts. Such acts constitute deceptive acts or practices in violation of Section 349 of New York's General Business Law.

Section 349 provides, in relevant part: "Deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any services in this state are hereby declared unlawful." N.Y. Gen. Bus. Law §349(a). "The statute seeks to secure an honest market place where trust, and not deception, prevails." *Goshen v. Mut. Life Ins. Co. of New York*, 98 N.Y.2d 314, 324, 774 N.E.2d 1190, 746 N.Y.S.2d 858 (2002) (internal quotations omitted). Private parties, such as Plaintiff, may bring an action to recover monetary damages and/or for injunctive relief for such violations. N.Y. Gen. Bus. Law §349(g).

To state a claim under Section 349, "a plaintiff must allege: (1) the [defendant's] act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result." *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2nd Cir. 2009); *Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 55 720 N.E.2d 892 (N.Y. 1999) (complaint must simply allege that the defendant has engaged "in an act or practice that is deceptive or misleading in a material way and that plaintiff has been injured by reason thereof.").

A deceptive practice which is "misleading in a material way" is one which is "likely to mislead a reasonable consumer acting reasonably under the circumstances." *State of New York v. General Electric Co.*, 302 A.D.2d 314, 315, 756 N.Y.S.2d 520 (App. Div. 1st Dep't. 2003). Section 349 does not require proof of scienter or "intent to defraud or mislead." *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank*, 85 N.Y.2d 20, 26, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995).

Significantly, especially for this action, statements are actionable under Section 349, even if ***literally true***, if there is "evident capacity of the representations at issue to mislead even reasonable consumers acting reasonably under the circumstances." *General Electric*, 302 A.D.2d at 315. In the case of product packaging and advertising, the court must consider the alleged false representations in light of its context on the label and the marketing of the product as a whole and not dissect each representation in isolation. *Ackerman v. Coca-Cola, Inc.*, No. 09 Civ. 395, 2010 WL 29252955 (E.D.N.Y. July 21, 1990)

Finally, Section 349 claims "need only meet the bare-bones notice-pleading requirements of Rule 8(a)" and are not subject to the pleading with particularity requirements of Rule 9b). *Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508, 511 (2nd Cir. 2009).

B. The Complaint Readily Meets The Legal Standards For Pleading An Actionable Claim Under Section 349 of the General Business Law

As described fully above, the Complaint details highly specific factual allegations of Defendant's deception in marketing and packaging of its Beggin' Strips products to mislead consumers into believing that they are purchasing a dog treat comprised with significant amounts of "real bacon" when bacon and bacon fat are actually only very minor ingredients. This practice – including the package labeling and the mass media advertising campaign -- is directed expressly at consumers, and so, is, of course, "consumer-oriented," satisfying the first prong under *Spagnola*.

Even if it is "literally true" that the Beggin'Strips products contain "real bacon" -- in miniscule quantities -- because reasonable consumers are led to believe by Defendant's marketing and packaging that the products consist substantially of real bacon, as opposed to ground corn, wheat meal, and gluten, among other fillers, the acts and practices are misleading in a material respect. The second prong under *Spagnola* is met. *See General Electric*, *supra* ("literal truth is not an availing defense in light of the evident capacity of the representations at issue to mislead even reasonable consumers acting reasonably under the circumstances"), citing

Matter of Lefkowitz v. E.F.G. Baby Products Co., 40 A.D. 364, 368, 340 N.Y.S.2d 39 (App. Div. 3d Dep't 1973).

Third, Plaintiff Kacocha and the other class members have been damaged because they bought and paid a premium price for a dog treat product that they were reasonably led to believe contained real bacon in substantial and meaningful amounts, when bacon and bacon fat are simply minor ingredients and the bulk of the product consists of corn meal and other such fillers; as a result, the final *Spagnola* prong is satisfied.

Judge Gleeson's recent decision in *Paulino v. Conopco, Inc.*, 2015 U.S. Dist. LEXIS 108165 (E.D.N.Y. Aug. 17, 2015), is particularly apposite. There, the complaint alleged that defendant deceptively marketed its products with the label "Naturals" when, in fact, they contain *primarily* unnatural, synthetic ingredients. In addition to representations on the front labels that the products were "Naturals," plaintiffs alleged that other aspects of the labeling would lead a reasonable consumer to believe she was purchasing natural products, including statements that the products are "infused with" natural-sounding ingredients such as "mineral-rich algae extract." These statements were accompanied by images of natural scenery or objects such as blooming cherry blossoms, lush rainforest undergrowth, or a cracked coconut, and the products' names reflected natural environments such as "Rainforest Fresh" and "Waterfall Mist." The court rejected defendant's contention that no reasonable consumer could conclude that these products were "natural." Instead, in denying the motion to dismiss, the court held that "[a] reasonable juror could reach the conclusion that the label "Naturals" means that the product *is at least mostly comprised of* natural ingredients." *Id.* at *10-14. (Emphasis added).

Judge Gleeson's decision demonstrates the futility of Defendant's motion and the fact that the instant complaint adequately sets forth an actionable claim under Section 349. Simply put, it is a question of fact for a jury to decide whether a seller who misleads a consumer into thinking she is buying a product consisting of one type of ingredient in a substantial quantity, when only a minimal amount of that ingredient is present, violates Section 349.

C. Virtually Identical Claims Against Purina For Deceptively Marketing Beggin' Strips Have Been Sustained By the District Court For The Eastern District Of Missouri, Applying Second Circuit Law, And That Court's Reasoning Is Compelling.

Quite remarkably, Defendant's brief never mentions that it filed and lost a motion to dismiss a complaint brought in the Eastern District of Missouri by its competitor, Blue Buffalo, concerning, among other things, the very same representations in Defendant's advertising and labeling of its Beggin' Strips dog treats. In *Blue Buffalo v. Nestlé Purina Petcare Co.*, Case No. 4:15 CV 384 RWS (E.D. Mo.), Purina's direct competitor, Blue Buffalo, alleged that Purina violated the Lanham Act's proscriptions against false advertising (as well as Connecticut's unfair trade practices law and the common law) with respect to ten of its pet food brands, including its Beggin' dog treat products, on television, in print, on its websites, and on its packaging.[1]

In particular, Blue Buffalo alleged that Purina falsely portrayed Beggin' strips as containing real bacon as their main ingredient when they are made primarily of other ingredients, with bacon consisting of only a tiny fraction of the product. Id., 2015 U.S. Dist. LEXIS 74905, at *2-3. Purina moved to dismiss, arguing, as it does here, that as a matter of law, no reasonable consumer could be confused by its advertising and product packaging because its products all contain accurate ingredient statements, and that even if a consumer were confused by its advertising, the ingredient statements would clarify the confusion. *Id.* at *10-11. The court rejected this argument, holding that "the mere presence of an ingredient statement on the back of a product 'does not eliminate the possibility that reasonable consumers may be misled.'" *Id.* at *11-12, quoting *Ackerman*, 2010 WL 2925955, at *16-17. Rather, "the effect that an ingredient statement may have on a reasonable consumer's understanding of advertising and product labels involves a factual inquiry." *Blue Buffalo* at *11-12. As a result, "whether an advertisement is deceptive 'is generally a question of fact which requires consideration and weighing of evidence from both sides and therefore usually cannot be resolved through a motion to dismiss.'" *Id.* at *9-10, quoting *Ackerman* at *17.

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[1] Although Blue Buffalo asserted false advertising claims under Section 43(a) of the Lanham Act, the pleading standards under Section 349 of the General Business Law are substantially the same and the courts follow the same analysis. *See, e.g., Gottlieb Dev. LLP v. Paramount Pictures Corp.*, 590 F.Supp.2d 625, 636 (S.D.N.Y. 2008); *Avon Prods. v. S.C. Johnson & Sons, Inc.*, 984 F.Supp. 768, 800 (S.D.N.Y. 1997).

Purina also argued that any of its representations made in its product labels cannot be misleading to a reasonable consumer because it complied with the FDA product identification regulations and the Association of American Feed Control Officials pet food labeling regulations. The court ruled, however, that there is no legal authority supporting Purina's proposition, and noted that the U.S. Supreme Court has held that compliance with labeling regulations does not preclude comprehensive imposition of liability. *Id.* at *12-13, citing *Pom Wonderful LLC v. Coca-Cola Co.*, 124 S.Ct. 2228 (2014).

The *Blue Buffalo* court then analyzed Purina's television commercials and packaging for its Beggin' Strips dog treats in great detail. The court described the same television commercial alleged to be misleading in the instant Complaint, emphasizing the multitude of times "bacon" is shown or spoken in the commercial. The court noted that along with the commercial, Blue Buffalo alleges that the fact that the treats are made to look like strips of bacon is misleading, and the packaging also reinforces the idea that Beggin' Strips are bacon because the text "made with real bacon" is included on the packaging. Purina countered that it does not advertise nor imply that Beggin' Strips are comprised mainly of human quality bacon and that no reasonable consumer would draw that conclusion, asserting that the advertisements limit the description with qualifiers such as "made with real bacon" and "bacon flavored." Purina further argued that the ingredient list transparently shows that bacon is not a main ingredient and the labels comply with FDA and AAFCO regulations. Purina also argued that the advertisements are puffery because they are so obviously hyperbolic and exaggerated that no reasonable consumer would take them at face value. *Id.* at *15-17. These are the very same arguments that Defendant asserts in the instant action.

The court, *id.* at *17-18, rejected Purina's arguments and ruled that Blue Buffalo stated a plausible claim for false advertising of the Beggin' dog treat products:

> Reviewing the challenged statements, advertisements, and packaging under the appropriate standards, I find that Blue Buffalo has stated a plausible claim for false advertising under the Lanham Act. Purina's arguments may prove to be effective in summary judgment or at trial. However, because they center on a determination of what a reasonable consumer would believe, and because the Second Circuit requires courts to consider extrinsic evidence of consumer impact when determining whether a reasonable consumer would be misled, dismissing these claims from the Complaint would not be appropriate at this stage of the case. Additionally, even if extrinsic evidence were not required, it is not clear that the challenged statements and advertisements, when viewed together and in context, are mere puffery. While Purina is correct that the Beggin' Strips commercial featuring a dog looking for bacon is hyperbolic, hyperbole does not prevent an advertisement from being misleading. *See Charter Communs. Inc. v. Southwestern Bell Tel. Co.*, 202 F.Supp.2d 918, 929-30 (E.D. Mo. 2001).

While the court's decision in *Blue Buffalo* may not be binding precedent for this Court, Judge Sippel's decision is well-reasoned and equally compelling here.

D. Whether "Reasonable Consumers" Are Deceived By Defendant's False Advertising And Packaging Is A Question Of Fact And Is Not Grounds For Dismissal.

Defendant contends, without foundation, that Plaintiff's Section 349 claim should be dismissed because no "reasonable consumer" could be misled by any of its allegedly false advertisements or packaging. Def. Br. at 6-16. Judge Sippel, in *Blue Buffalo*, correctly determined that resolution of the misleading nature of Purina's advertisements and packaging is a question of fact not suited to dismissal on a motion to dismiss. That holding is in accord with most courts which recognize that "[t]he falsity of advertising is an issue of fact." *Gordon & Breach Science Publishers v. Am. Inst. of Physics*, 859 F.Supp. 1521, 1532 (S.D.N.Y. 1994). Indeed, a multitude of courts in the Second Circuit holds that the *factual* question of whether an advertisement is false or misleading is *not* appropriate for resolution on a motion to dismiss. *See, e.g., Time Warner Cable, Inc. v. DirecTV, Inc.*, 497 F.3d 144, 158 (2nd Cir. 2007) (holding that it is inappropriate to resolve whether an advertisement is false or misleading on a motion to dismiss because the court must look to extrinsic evidence "to determine what 'the person to whom an advertisement is addressed find[s] to be the message,'" quoting *Am. Home Prods. Corp. v. Johnson & Johnson*, 577 F.2d 160, 166 (2nd Cir. 1978)); *Koenig v. Boulder Brands, Inc.*, 995 F.Supp.2d 274, 288 (S.D.N.Y. 2014) (denying motion to dismiss where product label included confusing and/or contradictory information about the contents, "[b]ecause it is unclear to the Court whether, as a matter of law, a reasonable consumer might be confused or misled."); *In re Frito-Lay N.A. v. All Natural Litig.*, No. 12 MDL 2413, 2013 WL 4647512, at *15 (E.D.N.Y. Aug. 29, 2013) (determination of whether consumers would be misled by the word "natural" on the product label generally cannot be determined on a motion to dismiss); *Ackerman*, *supra*, 2010 WL 2925955, at *17 (whether an advertisement is deceptive "is generally a question of fact which requires consideration and weighing of evidence from both sides and therefore usually cannot be resolved through a motion to dismiss," quoting *Williams v. Gerber Prods. Co.*, 552 F.3d 934, 939 (9th Cir. 2008)).

As the case law plainly demonstrates, Purina's "reasonable consumer" arguments are either irrelevant, or at best, must await another day when the question will be ripe for determination by the trier of fact. Nevertheless, Defendant's blatant mischaracterization of the allegations of the complaint should not go without comment. For instance, Defendant asserts in a heading in its brief: "It Is Not Plausible That A Reasonable Consumer Believes That A Shelf-Stable Bag Of Dog Treats Are Slices Of Human Grade Bacon" and goes on to claim that "Plaintiff contends that a reasonable consumer, walking down the pet-food aisle of his or her local grocery store, would be deceived into believing that Beggin' Strips dog treats are slices of human-grade bacon, plucked from a frying pan." Def. Br. at 7, citing Complaint at ¶9. Paragraph 9, however, simply alleges that Plaintiff was led to believe and believed "that the Beggin' dog treat products contained real bacon as a primary ingredient." Defendant's argument that no reasonable consumer would be deceived by its television commercials because "[i]t is not reasonable for a consumer to expect that Beggin' Strips are strips of human grade bacon based on its clear presentation as a dog treat that is made with real bacon," Def. Br. at 13, is thus a red herring. *Nowhere does the Complaint ever allege* that consumers are misled into believing the product consists of strips of human grade bacon. Rather, the Complaint simply alleges that consumers are deceived into believing that real bacon is a *primary ingredient*, instead of being present in miniscule quantities. *See, e.g.*, Complaint at ¶¶1, 2, 9, 13-16, 20, 22, 37-38. Defendant's disingenuous attempt to rewrite the complaint, of course, must be disregarded by the Court, which is bound, for the purposes of this motion, to accept as true the facts as alleged and to draw all inferences therefrom in Plaintiff's favor. *Ashcroft, supra*, 556 U.S. at 678.

Defendant relies upon a couple of poorly-reasoned decisions from the federal courts in California for its sweeping – and wrong – assertion that "[c]ourts have not hesitated to dismiss claims similar to those made here." Def. Br. at 7-12. Tellingly, again, Defendant has failed to even cite to the *Blue Buffalo* decision which considered the identical packaging and commercials at issue in this lawsuit and concluded that the complaint adequately alleged deceptive trade practices. Moreover, the recent decision dismissing the complaint in *Workman v. Plum, Inc.*, 2015 WL 6664837 (N.D. Cal. Nov. 2, 2015), is erroneously decided (Plaintiff's counsel herein represents plaintiff Workman and has filed an appeal in the Ninth Circuit), and is in conflict with the law in this Circuit and the well-reasoned *Blue Buffalo* opinion. In *Workman*, the court found that prominent pictures of multiple healthy ingredients such as quinoa or blueberries on the front of the package could not mislead a consumer into thinking that the product consisted predominantly of those ingredients, when, in reality, they were only present in trace amounts, and the products were primarily composed of sugary apple juice or grape juice. The *Workman* decision contradicts the binding Ninth Circuit precedent of *Williams* 552 F.Supp.2d 934. In *Williams*, the district court dismissed false advertising claims relating to fruit juice snacks on the ground that the ingredient list on the product packaging ensures that consumers are not deceived. The Ninth Circuit reversed, holding that the presence of the FDA-mandated ingredient list on the side of a product does not bar false advertising claims based upon misleading statements on the front of the product. *Id.* at 939.

Defendant's reliance on *Werbel ex rel. v. Pepsico*, 2010 WL 2673860 (N.D. Cal. July 2, 2010), is likewise misplaced. There, the court dismissed a complaint alleging that defendant misled consumers into believing that Cap'n Crunch's Crunch Berry cereal contained some nutritional value derived from real berries or real fruit. While acknowledging that whether or not business practices are deceptive is generally a question of fact not suited for disposition in a motion to dismiss, the court found that the specific complaint at issue – which plaintiff's counsel had previously filed in another district only to have it twice dismissed – could be dismissed as a matter of law. The court noted that the "Crunch berries" do not remotely resemble any natural fruit, the packaging contains no representation that the cereal balls are derived from real fruit, and the packaging contains no depictions of real fruit, but rather, clearly states that the product is sweetened corn and oat cereal. The court concluded that there simply is nothing in the Cap'n Crunch packaging that would lead a reasonable consumer to believe that the brightly-colored cereal balls depicted on the product cover and described as Crunch Berries are, in fact, made or derived from *real* berries or *real* fruit. In contrast, the instant Complaint alleges that the front of the Beggin' Strips package prominently states "made with real bacon," and displays a small black frying pan containing two sizzling pieces of bacon, Complaint at ¶17, while the back packaging features the image of a crazed, salivating dog chasing what looks like a giant, crispy strip of bacon, and the back packaging goes on to explain "BacoNology 101." Complaint at ¶18.

Similarly misplaced is Defendant's reliance on *McKinnnis v. Kellogg USA*, 2007 WL 4766060 (C.D. Cal. Sept. 19, 2007), which dismissed a complaint alleging that Froot Loops cereal packaging deceptively led reasonable consumers to believe that the cereal actually contained real fruit. The court found that the product's name, spelled F-R-O-O-T, appears as the trademarked name of the cereal, not on its own or as a description of the actual ingredients of the cereal. As to plaintiff's allegation that the cereal pieces resemble fruit, the court found that irrational since the cereal pieces – brightly covered rings – in no way resemble any known fruit. Moreover, the small "vignettes" of fruit surrounding a "NATURAL FRUIT FLAVORS" banner, was not a specific affirmation that the products contain any fruit at all. The court also noted that the front panel of the box clearly and accurately describes the product as a "SWEETENED MULTI-GRAIN CEREAL," not any sort of fruit-based cereal, and the side panel lists all of the ingredients, none of which is a fruit.[2]

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[2] In *Ackerman*, Judge Gleeson rejects the *McKinnis* analysis. *See also Lam v. General Mills, Inc.*, 859 F.Supp.2d 1097 (N.D. Cal. 2012) (where defendant moved to dismiss on the ground that advertising its "Fruit Roll Ups" and "Fruit by the Foot" as being "made with real fruit" was objectively true and consumers would not interpret such advertising as making any representations regarding the identity or quantity of fruits, court denied the motion,

The factual allegations in *McKinnis* are a far cry from those in the instant Complaint. Here, for instance, the Complaint at ¶17 alleges that the Beggin' Strip packaging states that the product is "made with real bacon," below which a large image of a crispy piece of bacon is splayed across nearly one-half of the package. Just below the crispy piece of bacon is an icon of a small black frying pan containing two sizzling pieces of bacon. And the product looks like and smells like bacon. Complaint at ¶¶2, 9. Defendant's message that Beggin' Strips are largely comprised of bacon is further communicated through its omnipresent television commercials such as the famous "There's No Time Like Beggin' Time." Complaint at ¶¶14-15.

E. Compliance With FDA And Industry Labelling Conventions And Providing An Ingredient List Does Not Immunize Packaging From False Advertising Claims.

Defendant suggests that its affirmations on the packaging that its product is "made with real bacon" and "bacon flavor" cannot mislead reasonable consumers into believing that Beggin' Strips consist largely of real bacon because American Feed Control Officials ("AAFCO") regulations and New York law permit naming an ingredient on a pet food label when the ingredient constitutes at least 3% of product weight. Def. Br. at 9-10. That position has been rejected by the Supreme Court in *POM Wonderful LLC v. Coca-Cola*, 134 S.Ct. 2228, 2241 (2014), which held that compliance with FDA labeling requirements does not preclude claims for false advertising. *Accord Blue Buffalo*, 2015 U.S. Dist. LEXIS 74905, at *12-13 ("Despite Purina's argument to the contrary, there is no legal authority for the proposition that no reasonable consumer could be misled by labeling that complies with FDA and AAFCO regulations.").

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holding that after seeing the products' name and marketing as a whole, "a reasonable consumer might be surprised to learn that a substantial portion of each serving of the Fruit Snacks consists of partially hydrogenated oil and sugars," and that consumers could not be expected "to look beyond 'made with real fruit' in order to discover the truth in small print").

Similarly, Defendant contends that any misconception a reasonable consumer might have that bacon is present in substantial amounts would be clarified by the ingredient statement listing ingredients in descending order of predominance by weight. Def. Br. at 12. Courts routinely reject this argument. *See*, *e.g.*, *Williams*, 552 F.3d at 939 ("We do not think that the FDA requires an ingredient list so that manufacturers can mislead consumers and then rely on the ingredient list to correct those misinterpretations and provide a shield for liability for the deception."); *In re Bayer Corp. Combination Aspirin Prods. Mktg. & Sales Practices Litig.*, 701 F.Supp.2d 356, 375-376 (E.D.N.Y. 2010) ("Even if … the labeling meets the floor established by federal regulations, there is nothing to indicate that it could not still be misleading and therefore actionable under state consumer protection laws."); *Ackerman*, 2010 WL 2925955, at *16 ("The fact that the actual sugar content of [the product] was accurately stated in an FDA-mandated label on the product does not eliminate the possibility that reasonable consumers may be misled," recognizing that "even reasonable consumers may not read the nutritional label prior to every purchase of a new product" and could rely upon the very existence of a government-regulated nutritional label to vouchsafe for the accuracy of the representations made elsewhere on a product's packaging); *Blue Buffalo*, 2015 U.S. Dist. LEXIS 74905, at *10-12 ("[T]he mere presence of an ingredient statement on the back of a product 'does not eliminate the possibility that reasonable consumers may be misled."), quoting *Ackerman*; *Hughes v. Ester C Co.*, 930 F.Supp.2d 439 (E.D.N.Y. 2013) (holding that a disclaimer on the back of a product does not, as a matter of law, eliminate a likelihood that consumers are misled by claims on the front of the product). Moreover, it is preposterous to presume that reasonable consumers know that the FDA-mandated ingredient label lists ingredients in descending order of predominance by weight, particularly because the ingredient list does not show what percentage (by weight) each ingredient comprises.

F. Defendant's False Advertisements Are Not Inactionable "Puffery"

Defendant wrongly argues that Plaintiff's claims should fail because "many of the challenged advertising statements constitute nothing more than puffery, and puffery cannot plausibly deceive a reasonable consumer." Def. Br. at 19. "Puffery," however, is a factual defense, which, if raised at all, must be raised at trial. As such, courts routinely deny motions to dismiss on this basis because the question of what constitutes puffery cannot generally be resolved without evidence of how the advertisement is perceived by actual customers. *See, e.g., Verizon Directories Corp. v. Yellow Book USA, Inc.*, 309 F.Supp.2d 401, 407-408 (E.D.N.Y. 2004) (denying motion to dismiss based on puffery because a fair evaluation of what was being communicated and what was being understood by an advertisement must be based on evidence and not just the pleadings); *Nasdaq Stock Mkt., Inc. v. Archipelago Holdings, LLC*, 336 F.Supp.2d 294, 305 (S.D.N.Y. 2004) (puffery defense "necessitates a fact-specific determination of whether the advertisements at issue contain an implied falsehood sufficiently specific to mislead the relevant consumers").

Here, Defendant's packaging and advertisements do not even come close to satisfying the puffery standard. None of the challenged materials involve "a general claim of superiority over comparable products that is so vague that it can be understood as nothing more than an expression of opinion." *Time Warner Cable, Inc. v. DIRECTV, Inc.*, 497 F.3d 144, 160 (2^{nd} Cir. 2007). Nor do they involve "an exaggerated, blustering, and boasting statement upon which no reasonable buyer would be justified in relying." *Id.* Rather, the packaging and advertisements "describe the contents of a food product in ways consumers might reasonably rely on in choosing to purchase [it].” *Ackerman*, 2010 WL 2925955, at *17. The declaration “Made with real bacon” and advertisements and packaging which lead reasonable customers to believe they are buying a dog treat product in which real bacon is present in meaningful quantities are factual, not fanciful, representations. This is not non-actionable puffery. *Williams*, 552 F.3d at 939, n.3 (factual misrepresentations are not puffery).

With respect to its television commercials and packaging, Defendant wrongly contends that they are hyperbolic and contain “exaggerated visual representation that would not mislead a reasonable consumer.” Def. Br. at 19-20. But Defendant’s consistent and repeated highlighting of real bacon in its commercials, both in words and realistic images, culminating in a human voiceover boldly asserting “Beggin’ Strips, Made with real bacon,” along with the packaging’s visual images of bacon and the banner “Made with real bacon,” Complaint at ¶¶14, 17, are not meaningless bluster. Instead, they are concrete and specific representations that real bacon is one of the predominant ingredients in the product, when, in fact, it is only present in a miniscule amount. Moreover, just because the television ads and product packaging are humorous does not mean that they are puffery. *See Verizon Directories*, 309 F.Supp.2d at 407 (commercials that “are merely playful and absurd” cannot be characterized as “mere puffery” on a motion to dismiss); *Charter Communications, Inc. v. Sw. Bell Tel. Corp.*, 202 F.Supp.2d 918, 929-930 (E.D. Mo. 2001) (the mere fact that a television commercial is humorous does not mean that the advertisement does not misrepresent a statement of fact, and thus, is not puffery); J. Thomas McCarthy, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION §27:56 (4th ed. 2014) (“Dramatic television presentations of the product cannot be dismissed as puffing fantasies if they convey some clear and false message.”).

G. Plaintiff Has Standing To Pursue His Claims Because He Alleges He Was Deceived

Defendant's challenge to Plaintiff's standing is critically infirm, as it is based on a miscomprehension of Section 349, bad law, and is, in any event, contradicted by the express allegations of the Complaint. Defendant seems to believe that Plaintiff only has standing if he himself has been deceived by the labeling of Beggin' Strips, has seen all the advertisements for and physical aspects of the product that contain misrepresentations and has *relied* thereon to his detriment. Def. Br. at 16-19. That simply is not the law. Section 349 does not have any *reliance* requirement. That point has recently been emphasized by the New York Court of Appeals in *Koch v. Acker, Merrall & Conduit Co.*, 18 N.Y.3d 940, 941, 967 N.E.2d 675, 944 N.Y.S.2d 452 (2013) ("To the extent that the Appellate Division order imposed a reliance requirement on General Business Law §§ 349 and 350 claims, it was error. Justifiable reliance by the plaintiff is not an element of the statutory claim.").[3] In any event, Plaintiff has, indeed, directly and expressly alleged that he himself has been deceived by the falsehoods contained on the Beggin' Strips label and those advertisements which he has viewed and has suffered actual injury from his purchases, *see* Complaint at ¶9.[4] Plaintiff's allegations readily meet the requirements for standing under Article III and Section 349.

Similarly, defendant purposefully miscasts the allegations of the Complaint to draw its baseless conclusion that "at the time he purchased the product, plaintiff knew that bacon was not

[3] Defendant's "reliance" on *Gale v. IBM Corp.*, 9 A.D.3d 446, 447 (2nd Dept. 2004), in light of the *Koch* decision, is plainly misplaced.

[4] Paragraph 9 alleges: "Over the years, Plaintiff has been exposed to and has seen Defendant's representations by reading the labels of the Beggin' dog treat products, as well as by having viewed some of Defendant's television commercials for the products. Based on the representations contained on the Beggin' product packaging and on the advertisements for the Beggin' dog treat products Plaintiff had viewed, Plaintiff was led to believe, and believed, that the Beggin' dog treat products he purchased contained real bacon as a primary ingredient…Plaintiff has since learned that the Beggin' dog treat products contain only a very minimal amount of real bacon…Had Plaintiff Kacocha known the truth about Defendant's misrepresentations and omissions about the ingredients contained in those products, Plaintiff would not have purchased the Beggin' dog treat products that he did, and in any event, he would have not paid the premium price he paid. As a result, Plaintiff Kacocha has suffered injury in fact and lost money."

the primary ingredient." Def. Br. at 16-17. Nowhere does the Complaint allege that Plaintiff, himself, at the time of purchase, knew that FDA regulations require that food packaging bear a label showing a list of ingredients, with the ingredients listed in descending order of predominance, by weight. *See* Complaint at ¶¶18-19. Likely, only a handful of consumers knows what the labeling requirements mean. The label itself certainly does not explain this, and Defendant does not provide any breakdown of the percentage of the Beggin' Strips product which each labelled ingredient comprises. Likewise, Defendant's assertion that "Plaintiff also contends that he reviewed the 'Guaranteed Analysis' on the back of the packaging,'" Def. Br. at 16-17, has no support in reality. Paragraph 20 of the Complaint never alleges that Plaintiff reviewed this "Guaranteed Analysis." It is, thus, hard to understand how Defendant can argue to the Court in good faith that Plaintiff has somewhere admitted that he "reviewed the entire label and the ingredient list and knew the relative predominance of bacon in the product…" Def. Br. at 17.

Likewise, Defendant's argument that Plaintiff never alleges he saw "one famous television ad" *prior to* purchasing Beggin' Strips and therefore lacks standing to sue based on representations therein, Def. Br. at 18, makes no sense. Plaintiff expressly alleges in Paragraph 14 that he has, in fact, viewed that "one famous television ad." Whether Plaintiff had viewed the television commercial prior to or after his purchases (and Plaintiff alleges he made several Beggin' Strips purchases per year for several years, Complaint at ¶8) is irrelevant to whether he was misled by this ad. Similarly unavailing is Defendant's argument that because Plaintiff had to purchase the Beggin' Strips package and open it before he could tell that the dog treats look and smell like real bacon, he cannot predicate liability upon what occurred once he opened the bag. Def. Br.at 18-19. Plaintiff purchased and opened multiple packages for several years before learning that the product only contained a tiny amount of real bacon.

Finally, Defendant's contention that Plaintiff may not sue based on the allegations of consumer fraud contained on Purina's website and online promotional materials because he fails to allege that he ever saw these statements prior to purchasing Beggin' Strips, Def. Br. at 17-18, is expressly undercut by one of the decisions Defendant cites in support of this proposition. *See Goldenberg v. Johnson & Johnson Consumer Cos.*, 8 F.Supp.3d 467, 480 (S.D.N.Y. 2014) (where plaintiff describes the allegedly misleading advertising and statement and then alleges that defendant's misleading statements have deceived plaintiff, the reasonable inference to be drawn is that plaintiff saw those statements and was deceived into purchasing the products in question, notwithstanding that plaintiff did not expressly allege seeing them).

CONCLUSION

In light of the foregoing, Plaintiff has little doubt that when the Court scrutinizes the instant Complaint and the advertising and packaging at issue, the Court will find the rationale of the *Blue Buffalo* decision to be compelling, and will reach a similar conclusion: that Purina's motion to dismiss should be denied, together with such other and further relief as the Court deems just and warranted.[5]

Dated: White Plains, New York
December 21, 2015

Respectfully submitted,

/s/ Jeffrey I. Carton

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[5] While Plaintiff believes that the Complaint is well-pled and readily sets forth an actionable claim, should the Court find otherwise, Plaintiff respectfully requests leave to file an amended complaint, Defendant's groundless argument of futility notwithstanding. *See, e.g., Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, 138 (2nd Cir. 2000) (leave to amend should be freely granted).